U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 09 2005

EAC 03 082 50941

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marin Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an assistant professor at the University of Maryland School of Medicine (UMSM). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel explains the basis for the petitioner's claim of eligibility:

> [The petitioner] has been playing a leading role in the combined fields of medical statistics, epidemiology, and preventive medicine research. Specifically, [the petitioner] is a nationally recognized bio-statistician in breast and uterine cancer research, and in end-stage kidney disease and dialysis research. [The petitioner] creatively applies statistical techniques to the fields of clinical and basis medical research, including experimental design, quality control, and data analysis. [The petitioner] has made original contributions of major significance to our understanding of disease causes, treatments, and prevention.

Counsel states that the petitioner has played a central role in several important medical research projects, and that her "work sets the benchmarks for scientific and technological development in the combined field of bio-statistics, epidemiology, and preventive medicine."

Counsel, in the opening brief, claims that the petitioner has met various criteria that pertain to other immigrant classifications. For instance, counsel asserts that the petitioner "is a member of scientific associations that require outstanding achievements of their members." Such memberships are discussed in the regulations for other classifications, but not the classification the petitioner seeks in this proceeding, and there is nothing to indicate that meeting these criteria qualifies the petitioner for the waiver. We will briefly consider the claim regarding memberships, so as to provide a reference point to correlate the evidence itself and counsel's claims about that evidence.

Counsel states that, by becoming a full member of the International Biometric Society (IBS) and the American Statistical Association (ASA), the petitioner "has proven that she has earned a respected place in her field of endeavor." The petitioner submits background information about these associations, but this material does not show that either association requires outstanding achievements of its members. The by-laws of the Eastern North American Region of IBS state: "Membership is open to all residents of this region." The IBS statement of purpose indicates "[t]he Society welcomes as members biologists, mathematicians, statisticians, and others interested in applying similar techniques." There is no indication that prospective members must meet any minimum threshold of achievement or professional competence. As for ASA, the petitioner documents her membership, but offers no evidence that ASA membership is contingent on a level of achievement that could reasonably be deemed "outstanding." This example demonstrates that the record does not always support counsel's representations concerning the evidence of record.

Counsel lists several research projects, funded by grants from public and private sources, in which the petitioner has participated. Grant documents for one project do not identify the petitioner among the "key personnel" or "personnel" in the studies; the petitioner is briefly named among several other "collaborators." In a letter included with the grant documents, the petitioner refers to herself as a "consultant." The documents for another project list 27 "key personnel," none of whom is the petitioner. Page 125 of the grant application indicates that the beneficiary will provide "biostatistical support." The petitioner is clearly involved in these projects, but it is equally clear that she is providing support or consultation, rather than taking part in the research itself. The petitioner's greatest involvement appears generally to be in survey-type projects. Counsel cogently explains the role of statisticians in medical research, but the main issue here is not whether statisticians have a role in research, but rather whether it is in the national interest to exempt this particular statistician from the job offer/labor certification requirement that normally applies to the classification she has chosen to seek.

The petitioner describes her involvement in various projects, for example:

> In AIDS research, it is very common that HIV infection is not observed exactly, rather it is only known to be in a time interval, such as between two blood test dates. Moreover, the time of AIDS onset may not be observed exactly as well. . . . I developed a new weakly parametric method to estimate the distribution of doubly censored data, which can be applied to estimate the AIDS incubation distribution (The incubation period is the time from HIV infection to AIDS onset). My new method . . . is more flexible and accurate than purely parametric methods. Therefore, it has been accepted and implemented by other scientists in my field. . . .
>
> I have been a key personnel working on projects in Cancer disparities and intervention. . . . I have completed two studies. One is on comparing uterine sarcoma (a type of uterine cancer) in Black and White women in [the] United States by incidence, demographics, histologic distribution, treatment and survival . . . the other is on breast cancer epidemiology and racial difference in [the] United States. . . .
>
> In these two studies, I was the only statistician to carry out all critical medical data analysis. I extracted the necessary data from SEER database and created [a] new method to compute incidence rates by race and age, relative survival rates by race, age at diagnosis, and other important factors.

Along with copies of background materials, grant documents and published articles, the petitioner submits several witness letters. Counsel contends that these letters are "from the Leading Experts in the World." Without exception, every one of the initial witnesses is on the faculty of the University of Maryland School of Medicine. The record does not establish that these witnesses are "the Leading Experts in the World," and the witnesses themselves never claim as much.

Professor [redacted] Jr, chairman of the Department of Epidemiology and Preventive Medicine at UMSM, states that the petitioner is "an outstanding scientist" whose "recruitment to our faculty reflects our sense that she was, at that time, the most outstanding young academic biostatistician available in the country." Other witnesses assert that there is a "shortage" of such professionals, and that "the University of Maryland Cancer Center recently spent more than two years trying to fill a position for a biostatistician" (notwithstanding counsel's claim that "[t]he issue of worker shortage is NOT involved in this petition"

(counsel's emphasis). Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *Matter of New York State Dept. of Transportation* at 215.

Prof. [redacted] states that the petitioner's "analyses have been critical in trying to understand why black women have higher cancer rates, and, in turn, in trying to develop appropriate public health interventions to reduce cancer incidence in these high-risk populations." Prof. [redacted] and other UMSM faculty members assert that the petitioner has made important contributions to various significant projects. Professor Patricia Langenberg states that the petitioner has accumulated "a remarkable record in so short a time period for a young investigator."

The initial documentation submitted with the petition establishes that the petitioner is a successful and active biostatistician who has earned the respect of her collaborators, but it does not support counsel's claims that the petitioner is "nationally recognized" or that her "work sets the benchmarks for scientific and technological development" in her discipline.

The director denied the petition, stating that the evidence of record does not corroborate the at times hyperbolic claims set forth regarding the significance of the petitioner's work and the extent of her recognition. The director concluded that the petitioner had not established that his work has been, or is likely to be, of such significance as to warrant a national interest waiver.

The director denied the petition without first issuing a request for evidence. The director cited 8 C.F.R. § 103.2(b)(8), which indicates that a petition may be denied without a request for evidence if the record contains evidence of ineligibility. The director did not identify any evidence of ineligibility. The same cited regulation also indicates that a request for evidence should be issued if there is no evidence of ineligibility and the available evidence is insufficient to support a finding of eligibility. This latter circumstance appears more closely to mirror the facts of the proceeding at hand. From the construction of the regulation, it is clear that a lack of evidence is not the same thing as evidence of ineligibility. The most expedient remedy, at this stage, is to consider on appeal the new evidence that the petitioner would have submitted in response to a request for evidence, had the director issued one.

On appeal, counsel observes that the director, in the denial notice, acknowledged that the petitioner has made "original contributions" and made "indispensable" contributions to various research projects. Originality, however, is not a *prima facie* qualifier for the waiver; otherwise, the only scientists subject to the job offer requirement would be those whose work is not original. With regard to the petitioner's "indispensable" role in particular projects, it does not necessarily follow that an indispensable member of a team is equally indispensable on a national level. The only individuals to describe the petitioner's current work are her collaborators on those same projects. The record lacks objective evidence to show that the petitioner has produced results that would not be expected from most competent biostatisticians, or that the petitioner's work has been a key factor in completing projects that are especially important in comparison with other medical research projects nationwide. The initial evidence basically established that the petitioner is among the University of Maryland's favorite statisticians.

Counsel notes that the petitioner serves as "a Dissertation Committee Member for Doctoral Students in the University of Maryland School of Medicine." Counsel does not establish that this is rare among faculty members of graduate schools. Even if counsel had so established, the letter confirming the petitioner's involvement in two dissertation committees is dated nearly two years after the petition's filing date, and therefore this information cannot establish the petitioner's eligibility as of the date of filing, as required by

Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). *See also Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), which reaffirms that events that take place after the filing date cannot change the disposition of a petition that was not amenable to approval as of the filing date.

The petitioner submits documentation showing 26 citations of her published work. The citations are spread over seven articles, four of which were not published until after the petition was filed. At the time of filing, one of these articles had been cited once. The other 25 citations appeared after the filing date, mostly in reference to articles by the petitioner that also appeared after the filing date. In one instance, an article appeared in 1998, and apparently attracted no attention for about five years. Citations of that article began to appear in 2003 after the petition had been filed. Thus, at the time the petitioner filed her petition in January 2003, there existed no significant citation record of her work. The new citations do not continue a trend already established at the time of filing. We reject the proposition that the director should have approved the petition in January 2003, on the basis that the petitioner's subsequent work would later begin to attract attention in the field. At best, this evidence indicates that the petition was filed prematurely.

The petitioner submits three new witness letters on appeal. In letters that are similar in their general format, each of the witnesses denies having worked with the petitioner in the past. The witnesses discuss a project that the petitioner undertook in 1998 as a graduate student in Canada, for which the *Canadian Journal of Statistics* awarded the petitioner a prize. The witnesses echo counsel's claim that the petitioner received this award for writing the best paper of the year, but the prize certificate does not corroborate this claim. We note that prizes and other forms of recognition can form part (but not all) of a claim of exceptional ability, under 8 C.F.R. § 204.5(k)(3)(ii)(F), and that the plain language of the statute at section 203(b)(2)(A) shows that aliens of exceptional ability are generally subject to the job offer/labor certification requirement. It necessarily follows that what amounts to a partial claim of exceptional ability cannot, by itself, be a strong argument in support of a waiver request. The 1998 article that won the award shows no recorded citations prior to March 2003. The record offers no evidence that the article was considered influential by anyone other than its publisher in the intervening years.

Other than the 1998 article, the new witnesses focus on new research projects that were not mentioned in the initial submission. Their omission suggests that the projects began after the filing date, which once again supports that conclusion that the petitioner prematurely filed her petition and has subsequently emphasized contributions that she made after the filing date.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.